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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 725

SIDNEY SCHWARTZ,

Petitioner,

against

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Preliminary Statement

On January 4, 1965 petitioner was convicted in the Supreme Court of the State of New York, New York County (BACKER, J.) on six counts of an indictment[1] charg-

[1] The indictment charged petitioner with causing a false statement as to securities to be made, issued or published in violation of N. Y.

(Footnote continued on following page)

ing him with fraudulently issuing and selling both regular and subordinated limited partnership interests in excess of the stated capital as represented in the prospectus (People's Exhibit 1, R. 31). The judgment was unanimously affirmed by the Appellate Division, First Department, on July 1, 1965. Leave to appeal to the New York Court of Appeals was denied by Judge BURKE of that Court on August 6, 1965, and reargument was denied on August 18, 1965.

Petitioner now seeks review of the Appellate Division's judgment of affirmance, claiming that illegally seized evidence was used against him at trial in derogation of his rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution.

Opinions Below

The judgment of the Appellate Division, affirming the conviction without opinion, is reported at 24 App. Div. 2d 704. No opinion was written by Judge BURKE when he denied leave to appeal to the New York Court of Appeals.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257 (3).

(Footnote continued from preceding page)

Penal Law § 952 (Count 1); obtaining a signature to a written instrument by use of a false statement or writing in violation of § 932 of the Penal Law (Counts 2, 3, 4, 5 and 6); engaging in a fraudulent device or scheme to obtain money in violation of General Business Law § 352 (c) (Count 7); and committing a fraud in the affairs of a limited partnership in violation of § 920 of the Penal Law (Count 8). Petitioner was convicted on counts 1, 3, 4, 5, 7 and 8. He was sentenced to one year on counts 1, 3, 4 and 5; six months on count 7; and six months on count 8, all sentences to run concurrently.

Statutes and Constitutional Provisions Involved

The pertinent provisions of Article 23-A of the General Business Law, empowering the Attorney General to regulate the issuance and sale of securities including specific authority to examine witnesses under oath, compel production of books, documents and records, and also requiring registrants to file annual reports with the State Department of Law, are set forth in Appendix A, *infra*, p. 15.

Questions Presented

Whether petitioner's rights to be free from unreasonable searches and seizures were violated where:

1. Petitioner, as a general partner of a state regulated real estate firm, was served with an administrative subpoena *duces tecum* requiring the production of partnership records to which he responded by delivering some records and allowing representatives of the Attorney General to remove others from his office.

2. Petitioner concedes he consented to the search and examination of these records at his office but—for the first time—now denies he agreed to their removal, even though he cooperated fully with the inquiry both before and after the removal and never asked for their return prior to his indictment in July of the following year.

3. The records removed were held by petitioner in a representative capacity and were required by law to be kept for examination.

Statement

Petitioner was a general partner and in control of Beaux Arts Associates, a limited partnership organized by him in November of 1960 for the purpose of obtaining a long term ground lease to Beaux Arts Apartments, located in

Miami Beach, Florida (See prospectus, People's Ex. 1, R. 31). In order to raise the funds for acquisition of the property Schwartz caused a prospectus (Ibid.) dated February 23, 1961, to be issued. The prospectus, offering to the public some $790,000 in additional limited partnership interests, was filed with the Department of Law in accordance with § 352-e(1) of the General Business Law of the State of New York. Petitioner also filed a Registration Statement with the Securities and Exchange Commission under the Securities Act of 1933 (Ibid.).

Acting pursuant to his statutory mandate to protect the public against fraudulent practices in the sale of securities (See App. A, § 352 (1)) the Attorney General, in April of 1962, commenced an investigation into the activities of the petitioner in the real estate securities field. The full chronology of the investigation is set forth in an affidavit dated August 8, 1963 of Saul S. Cohen, Esq., the Assistant Attorney General in charge of the inquiry, submitted in opposition to petitioner's pre-trial motions for inspection of the grand jury minutes and dismissal of the indictment and for suppression of certain evidence.[2] The factual allegations of this affidavit have never been disputed by petitioner, except as herein indicated.

According to the Cohen affidavit, Schwartz appeared at the Attorney General's office with counsel on May 21, 1962, and was served with a subpoena *duces tecum* calling for the production of: "all books, papers, records and other documents in relation Beaux Arts Assoc." [sic].[3] He was at that time informed that he might be excused from answering any question put to him or from producing any

[2] See papers in support and in opposition to petitioner's motion of August 9, 1963 to inspect the Grand Jury minutes and to dismiss the indictment, and decision of Mr. Justice Gellinoff dated October 21, 1963 denying said motion. Appendix B, *infra*, p. 20. See also decision of Mr. Justice Sarafite dated February 27, 1964 denying petitioner's motion to suppress brought on same papers as the previous motion to inspect. Appendix C, *infra*, p. 21.

[3] Exh. 7 annexed to Mr. Cohen's affidavit dated August 8, 1963.

books, papers or other documents on the ground or for the reason that his answer or the documentary evidence requested might tend to incriminate him. Petitioner expressed his understanding of this admonition and further stated his willingness to cooperate fully and submit all materials which the Attorney General deemed useful in the investigation (*Id.* pp. 2 and 4).

It was agreed that petitioner would not have to bring any of these documents to the Attorney General's office, but could send them down by messenger (*Id.* p. 3). On June 12, 1962, some of the requested documents—specifically, the cash books, bank ledger and bank reconcilations of Beaux Arts Associates—were transmitted to Assistant Attorney General Cohen (*Id.*, Exh. 8).

Throughout the course of the investigation, petitioner submitted various other books and records relating to a number of his transactions in the real estate field including documents relating to Beaux Arts Associates (*Id.*, Exh. 11). In regard to some of the books and records subpoenaed by the Attorney General, Schwartz appeared at the Department of Law office on September 11, 1962, with his attorney, and claimed he was unable to produce them because a robbery had taken place in his office and his controller and head bookkeeper had resigned (*Id.*, p. 6). He stated, however, that the books were only misplaced, and agreed to allow members of the Attorney General's staff to examine all books and records at his office and remove those records which they deemed pertinent to the inquiry (*Id.*, p. 6).

After receiving a letter of authorization dated September 13, 1962[4] prepared by Schwartz' attorney, Mr. Gombar, an

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[4] *Id.*, Exhibit 16. The letter reads: "This is to advise you that pursuant to your request Mr. Sidney Schwartz' office has been authorized to make all books and records available for your examination at Mr. Schwartz' office."

accountant from the Attorney General's office, visited petitioner's office and made a preliminary examination.

On September 24, 1962 petitioner again appeared at the Attorney General's office, accompanied by counsel, and consented to a second visit by additional members of the Department of Law arranged for October 2, 1962. Three representatives of the Attorney General met Schwartz at his office on that date, and petitioner repeated that all books and records were available for examination and that those deemed relevant to the investigation could be taken.[5] The books and records were removed on authority of the outstanding subpoena and with petitioner's consent.

On the following day, October 3, 1962, petitioner appeared at the Attorney General's office. He made no complaint about the manner of the examination of his premises or of the books taken. Significantly, petitioner never denied in the courts below that he explicitly consented to the removal of these records on September 11, 1962. To the contrary, petitioner argued that the records were removed in compliance with a subpoena which had previously been served upon him.[6] His sole contention was that the records taken and the testimony given by him at the administrative hearings held by Mr. Cohen were all accomplished "under compulsion of subpoena,"[7] and that this somehow violated his constitutional rights.

At no time prior to his arrest did Schwartz or his attorney demand the return of any of the books and records

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[5] See affidavits of Mr. Gombar, Mr. Hatem and Mr. Cantor, submitted in opposition to petitioner's motion to inspect the Grand Jury minutes and to dismiss the indictment and incorporated by reference in opposition to the motion to suppress.

[6] See affidavits of Sidney Schwartz, dated July 30, 1963 and August 14, 1963 submitted in support of the motion to inspect the Grand Jury minutes and incorporated by reference in the motion to suppress evidence.

[7] *Id.*, affidavit dated July 30, 1963, pp. 2 and 4.

in issue. Instead, he cooperated fully, furnished the state with additional documents regarding Beaux Arts property as late as February 13, 1963,[8] and readily consented (with the advice of counsel) to subsequent visits at his office by members of the Attorney General's staff.[9]

ARGUMENT

Petitioner's claim that illegally seized evidence was used against him at trial is devoid of merit.

A. The books and records which were used at petitioner's trial were the subject of a subpoena which had not been satisfied at the time they were taken from petitioner's office on October 2, 1962.

The decision of Mr. Justice Sarafite (Appendix C, *infra*, p. 21), asserted to be erroneous in the petition (Pet. 9), is based on the finding that the books and records were obtained according to lawful process of subpoena which petitioner neither sought to quash nor refused to respond.

Petitioner argues in a vacuum, wholly ignoring the existence of the subpoena of May 21, 1962 which directed him to produce "all books, records, papers and other documents in relation Beaux Arts Assoc." This subpoena was only partially satisfied by the production on June 12, 1962 of the cash book, general ledger and bank reconciliation of Beaux Arts Associates, and by the production on August 9, 1962 of a list of subordinated units on the Beaux Arts property. As clearly documented in the affidavit of Assistant Attorney General Cohen and confirmed in Schwartz' affidavits of July 30, 1963 and August 14, 1963 (submitted in support of the motion to suppress), the October 2nd visit was made with the latter's consent in an effort to satisfy outstanding subpoenas.

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[8] *Id.*, p. 10.

[9] *Id.*, p. 9.

Petitioner admitted this when he stated in his affidavit of July 30, 1963 (p. 4):

> "Under the compulsion of subpoena I have been compelled to testify against myself and have been compelled to produce my books and records."

The record is replete with similar admissions (see papers in support of this motion and R. 443). These statements offer compelling proof that all the books and records were obtained pursuant to subpoena. The decision in the court below denying the motion to suppress, is thus amply supported by the record. Petitioner, having failed to persuade the state courts that the subpoena power was improperly used, has now completely shifted his position to claim there was no subpoena.

The suggestion in the petition (Pet. 11) that no subpoena was outstanding is based on excerpts taken out of context from statements made by the trial prosecutor[10] and wholly ignores statements of Schwartz, admitting that he produced the records pursuant to subpoena, as well as the obvious fact that the subpoena of May 21, 1962 was never satisfied. The inescapable fact is that a subpoena requiring the production of these books and records was unsatisfied and outstanding at the time they were obtained.

B. Even assuming, *arguendo*, that a subpoena was not outstanding, the record shows that petitioner consented to the removal of the books and records from his office.

Petitioner concedes that he consented to allow members of the Attorney General's staff to search and examine all records at his office on October 2, 1962 (Pet. 7, 8, and 11).

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[10] Petitioner is in error when he states (Pet. 9) that the Attorney General has admitted that there was no subpoena outstanding at the time the records were taken on October 2. The full context of the statement of the Attorney General at the trial, to which petitioner refers (*id.*) makes it clear that the trial prosecutor stated that *to the best of his recollection* there was no subpoena outstanding at that time. (See R. 507.)

However, he now—for the first time—blandly disputes the allegations in Assistant Attorney General Cohen's affidavit to the effect that petitioner told him on September 11, 1962 that representatives of the Attorney General could take whatever records they felt were pertinent to the investigation.

Even without considering this tardy refutation, and viewing only Schwartz' well documented, indisputable pattern of cooperation before and after the October 2nd visit, it is clear that he had consented to the removal of the records. Petitioner voluntarily and upon request furnished documents and information regarding his syndication activities before October 2nd.[11] Likewise, after said date, additional information and documents requested were supplied without protest. (*Id., e.g.,* Exh. 40). The visit on October 2nd was made with petitioner's express consent and after the Attorney General had received a letter of authorization prepared by his attorney (*Id.* Exh. 16). Significantly, on October 3rd, the day following the allegedly objectionable seizure, Schwartz readily consented to an examination of various records kept at his office (*Id.* p. 9). After receiving another letter of authorization prepared by his attorney (*Id.* Exh. 38), an examination taking several days was made. Notably, excerpts from the records were taken without objection (*Id.* p. 9).

All these events conclusively establish a pattern of continuing cooperation throughout the entire investigation and belie petitioner's belated denial that he consented to the removal of the records. It is significant that at no time prior to his arrest did he object to their removal or request their return.

This case is even stronger than *Zap* v. *United States,* 328 U. S. 624 (1946), vacated on other grounds 330 U. S. 800 (1947), where this Court upheld the admission into evi-

[11] See Exhibits 9, 10 and 11 annexed to Cohen affidavit of August 8, 1963.

dence of a check seized by the government, without the defendant's explicit consent, during an examination of his books and records to which he had agreed. In the affidavits submitted by petitioner in support of the pre-trial motions, he admits that he turned over the records in response to outstanding subpoenas. Even assuming a subpoena was not outstanding on October 2nd, the records were unquestionably subject to subpoena and the Attorney General could have compelled their production at his offices at any time.

To soften its impact, petitioner attempts to distinguish the *Zap* case by emphasizing inconsequential facts (Pet. 11 and 12). He urges, for example, without reference to the record, that the State could not make a "meaningful analysis" before seizing the records (Pet. 11). However, the fact that the State representatives spent a full day at petitioner's offices and took only selected records wholly refutes this assertion.

The record clearly shows that the Attorney General had subpoenaed these records and was entitled to examine them at his office. *Dunham* v. *Ottinger*, 243 N. Y. 423 (1926), app. dismissed 276 U. S. 592 (1928). Furthermore, petitioner had expressly consented to the search and ". . . the taking of the papers which the United States had the right to inspect to the government offices cannot be viewed as an unreasonable seizure within the meaning of the Fourth Amendment." *United States* v. *Sherry*, 294 F. 684, 686 (M. D. Ill., 1923).

Petitioner, having consented to the search and examination, was not prejudiced by the fact that the examination took place in the state's offices rather than his own. Certainly, ". . . The agreement to allow an inspection carried consequences at least so great." *Zap* v. *United States*, *supra*, at 629.[12]

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[12] Petitioner mistakenly assumes the introduction in evidence of the books and records removed on October 2 was necessary to his

(Footnote continued on following page)

C. The records taken were held by petitioner in a representative capacity and are deemed to be public or quasi-public records and, therefore, not subject to the personal privilege against unreasonable searches and seizures.

The issuance and sale of real estate syndication securities is regulated under both federal law (Securities Acts of 1933 and 1934) and New York State law (Articles 23-A of the General Business Law of the State of New York, § 352 *et seq.*). It cannot be questioned that by virtue of the broad investigative and administrative powers conferred under these statutes,[13] the books and records of a firm which registered a securities offering pursuant to those statutes are of a public or quasi-public nature and therefore non-privileged. *Cf. Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186 (1945); *Troy Laundry Co.* v. *Wirtz,* 155 F. 2d 53 (9th Cir. 1946), *cert. denied* 329 U. S. 723 (1946); *Dunham* v. *Ottinger, supra; Davis* v. *Securities and Exchange Commission,* 109 F. 2d 6 (7th Cir. 1940), *cert. denied* 309 U. S. 687 (1940).

In *Shapiro* v. *United States,* 335 U. S. 1 (1948), this Court said:

> ". . . Accordingly, the principle enunciated in the Wilson Case, and reaffirmed as recently as the Davis Case, is clearly applicable here: namely, that the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of

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(Footnote continued from preceding page)

conviction (Pet. 4, 5 and 6). However, the oversale of the $85,000 in subordinated units was established entirely by independent evidence and would be sufficient to uphold his conviction. See p. 19 of Respondent's Brief submitted to the Appellate Division, First Department.

[13] See Appendix A, *infra,* p. 15, General Business Law, §§ 352 (1), (2), and § 352-e (8).

> restrictions validly established'. (citations omitted)" (pp. 32 and 33)

In *Bowles* v. *Misle,* 64 F. Supp. 835 (D. Nebraska 1946), cited with approval in *Shapiro, supra,* at 23, the Court declared:

> ". . . the immunities of the Fourth and Fifth Amendments are not absolute but rather subject to waiver and that he who enters into, or continues in, a business subject to official regulation voluntarily submits his business records and papers to such visitorial examination as the law contemplates, and, in that measure waives his constitutional immunities of privacy in respect to his papers and against compulsory testimony." (p. 843)

See also: *Hale* v. *Henkel,* 201 U. S. 43 (1906); *Wilson* v. *United States,* 221 U. S. 361 (1910); *Davis* v. *United States,* 328 U. S. 582 (1946); *United States* v. *Mulligan,* 268 F. 893 (N. D., N. Y. 1920). The records here involved are required by law to be kept for inspection and examination by the State (see *supra,* p. 11) and are therefore non-privileged. *Cf. Dunham* v. *Ottinger, supra.*

Petitioner's suggestion that the books and records removed from his office were improperly taken because they were not instrumentalities of a crime[14] is not relevant in this case, where the petitioner had consented to an examination of the records and the records were removed pursuant to an administrative proceeding in a regulated industry. *Cf. Zap* v. *United States, supra; Oklahoma Press Publishing Co.* v. *Walling, supra; United States* v. *Morton Salt Co.,* 338 U. S. 632 (1950). In such cases the disclosure sought will be allowed if reasonable, i.e.,

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[14] For cases holding books and records as instrumentalities of a crime, see *Marron* v. *United States,* 275 U. S. 192 (1927); *United States* v. *Stern,* 225 F. Supp. 187 (S. D. N. Y. 1964).

if the investigation is authorized by statute and the documents sought are relevant to the inquiry (*Ibid.*). Undoubtedly, this test is met here.

In addition, the books and records taken were held by petitioner in a representative rather than in a personal capacity and, therefore, were not subject to the personal privileges against self-incrimination or unreasonable search and seizure. *United States* v. *Silverstein,* 314 F. 2d 789 (2d Cir. 1963), *cert. denied,* 374 U. S. 807 (1963); *cf. McPhaul* v. *United States,* 364 U. S. 372 (1960), rehearing denied 364 U. S. 925 (1960); *Rogers* v. *United States,* 340 U. S. 367 (1951); *United States* v. *White,* 322 U. S. 694 (1944). Petitioner himself stated in the prospectus (People's Ex. 1, R. 31) at page 14: "a limited partner has the right to inspect the partnership books, to have on demand information regarding partnership affairs and to obtain an accounting wherever circumstances render it just and reasonable."[15]

Petitioner attempts to becloud the issue in arguing that two of his purported "personal books" were allegedly illegally seized (Pet. 4). Not only were these books delivered with the other partnership records in response to the subpoena aforementioned but further they contain numerous partnership transactions.[16] Laura Satz, petitioner's bookkeeper and office manager, acknowledged this when she testified that People's Exhibit 51 ("Sidney Schwartz Spe-

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[15] New York Partnership Law, Article 8, § 99 provides: "(1) A limited partner shall have the same rights as a general partner to (a) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them. (b) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable . . ."

[16] People's Exh. 51 contains receipts of monies from Beaux Arts investors from August 12, 1960 to June 4, 1961; People's Exh. 52 records payment of distributions to various Beaux Arts investors as well as payment of partnership's organization and office expenses (see C. D. 32, 55 and 61).

cial Royal State Bank", R. 456) ". . . is mainly holding the receipts of the different syndications" (R. 455) and People's Exhibit 52 ("Sidney Schwartz Regular Trade Bank", R. 458) ". . . was for the organization, office payroll, office expenses" (R. 457).

The fact that the petitioner failed to contest the subpoena either before or after delivery of these books and never claimed they were personal books until the aforesaid motion to inspect and the motion to suppress is strong evidence they are the partnership's books. *United States* v. *Hopps,* 215 F. Supp. 734, 755 (D. Maryland 1962), aff'd 331 F. 2d 332, *cert. denied* 379 U. S. 820 (1964). Obviously, the character of the books will not be changed because they reveal improper conduct or contain some unrelated transactions. *Cf. Wilson* v. *United States, supra,* p. 378.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, New York, December 23, 1965.

Respectfully submitted,

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APPENDIX A

Article 23-A of the General Business Law of the State of New York.

§ 352. Investigation by attorney-general. 1. Whenever it shall appear to the attorney-general, either upon complaint or otherwise, that in the advertisement, purchase or sale within this state of any commodity dealt in on any exchange within the United States of America or the delivery of which is contemplated by transfer of negotiable documents of title all of which are hereinafter called commodities, or that in the issuance, exchange, purchase, sale, promotion, negotiation, advertisement or distribution within or from this state, of any stocks, bonds, notes, evidences of interest or indebtedness or other securities, including oil and mineral deeds or leases and any interest therein, sold or transfered in whole or in part to the purchaser where the same do not effect a transfer of the title in fee simple to the land, or negotiable documents of title, or foreign currency orders, calls or options therefor hereinafter called security or securities, any person, partnership, corporation, company, trust or association, or any agent or employee thereof, shall have employed, or employs, or is about to employ any device, scheme or artifice to defraud or for obtaining money or property by means of any false pretense, representation or promise, or that any person, partnership, corporation, company, trust or association, or any agent or employee thereof, shall have made, makes or attempts to make within or from this state fictitious or pretended purchases or sales of securities or commodities or that any person, partnership, corporation, company, trust or association, or agent or employee thereof shall have employed, or employs, or is about to employ, any deception, misrepresentation, concealment, suppression, fraud, false pretense or false promise, or shall have engaged in or engages in or is about to engage in any practice or transaction or course of business relating to the purchase, exchange or sale of securities or commodities

which is fraudulent or in violation of law and which has operated or which would operate as a fraud upon the purchaser, or that any broker, dealer, or salesman, as defined by section three hundred fifty-nine-e of this article, or any agent or employee thereof, has sold or offered for sale or is attempting to sell or is offering for sale any security or securities in violation of the provisions of said section or section three hundred fifty-nine-ee, any one or all of which devices, schemes, artifices, fictitious or pretended purchases or sales of securities or commodities, deceptions, misrepresentations, concealments, suppressions, frauds, false pretenses, false promises, practices, transactions and courses of business are hereby declared to be and are hereinafter referred to as a fraudulent practice or fraudulent practices or he believes it to be in the public interest that an investigation be made, he may in his discretion either require or permit such person, partnership, corporation, company, trust or association, or any agent or employee thereof, to file with him a statement in writing under oath or otherwise as to all the facts and circumstances concerning the subject matter which he believes it is to the public interest to investigate, and for that purpose may prescribe forms upon which such statements shall be made. The attorney-general may also require such other data and information as he may deem relevant and may make such special and independent investigations as he may deem necessary in connection with the matter.

2. The attorney-general, his deputy or other officer designated by him is empowered to subpoena witnesses, compel their attendance, examine them under oath before him or a magistrate, a court of record or a judge or justice thereof and require the production of any books or papers which he deems relevant or material to the inquiry. Such power of subpoena and examination shall not abate or terminate

by reason of any action or proceeding brought by the attorney-general under this article.

3. No person shall be excused from attending such inquiry in pursuance to the mandates of a subpoena, or from producing a paper or book, or from being examined or required to answer a question on the ground of failure of tender or payment of a witness fee and/or mileage, unless at the time of such appearance or production, as the case may be, such witness makes demand for such payment as a condition precedent to the offering of testimony or production required by the subpoena and unless such payment is not thereupon made. The provisions for payment of witness fee and/or mileage do not apply to any officer, director or person in the employ of any person, partnership, corporation, company, trust or association whose conduct or practices are being investigated.

4. If a person subpoenaed to attend such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall without reasonable cause refuse to be sworn or to be examined or to answer a question or to produce a book or paper when ordered so to do by the officer conducting such inquiry, or if a person, partnership, corporation, company, trust or association fails to perform any act required hereunder to be performed, he shall be guilty of a misdemeanor.

§ 352-e. Real estate syndication offerings. 1. (a) It shall be illegal and prohibited for any person, partnership, corporation, company, trust or association, or any agent or employee thereof, except companies organized under and pursuant to the provisions of articles nine or twelve of the public housing law or chapter eight hundred forty-five of the laws of nineteen hundred forty-two, to make or take

part in a public offering or sale in or from the state of New York or securities constituted of participation interests or investments in real estate, mortgages or leases, including stocks, bonds, debentures, evidences of interest or indebtedness, limited partnership interests or other security or securities as defined in section three hundred fifty-two of this article, when such securities consist primarily of participation interests or investments in one or more real estate ventures, including cooperative interests in realty, unless and until there shall have been filed with the department of law, prior to such offering, a written statement or statements, to be known as an "offering statement" or "prospectus" concerning the contemplated offering which shall contain the information and representations required by paragraph (b) of this subdivision unless the security offering is exempted hereunder or under section three hundred fifty-nine-f, subdivision two, of this article by rule or action of the attorney-general. The term "real estate" as used in the paragraph shall not include mineral, oil or timber leases or properties, or buildings, structures, land or other realty housing or containing business offices or industry, owned or leased by the issuer, where the issuer is not primarily engaged in the business of buying and selling such building or other realty or leases or interests therein. The circulation or dissemination of a non-firm offer (including circulation or dissemination of a preliminary prospectus pursuant to section ten (b) of the securities act of nineteen hundred thirty-three, and the rules thereto appertaining) shall not constitute the making of taking part in a public offering within the meaning of this section.

§ 352-e(8). Within four months after the end of its fiscal year, every syndicate which shall have been required to file an offering statement or statements or prospectus

under subdivision one of this section shall file with the department of law at its office in the city of New York an annual report of the syndicate operation, including an annual balance sheet and profit and loss statement certified by an independent certified public accountant. The department of law shall collect a fee of five dollars for the filing of each such annual report.

APPENDIX B

Opinion of Justice Gellinoff, dated October 21, 1963.

SUPREME COURT

NEW YORK COUNTY

SPECIAL AND TRIAL TERM—PART 30

Index No. 2531/63

PEOPLE OF THE STATE OF NEW YORK,

against

SIDNEY SCHWARTZ,

Defendant.

GELLINOFF, J.:

Defendant moves for an inspection of the Grand Jury minutes and for a dismissal of the indictment. Insofar as the motion urges that the indictment is based on insufficient legal evidence, it is denied (see People v. Howell, 3 N Y 2d 672). In the respect that the motion is based on the claim that defendant's constitutional rights were violated in that he was compelled to testify and furnish evidence against himself, it is likewise denied. The facts of this case, and the circumstances under which defendant testified before the Attorney General, do not bring him within the *ratio decidendi* of the cases relied on by him (e.g., People ex rel. Kenny v. Adams, 292 N. Y. 65; People v. Steuding, 6 N Y 2d 214; People v. Laino, 10 N Y 2d 161). The defendant did not testify before the Grand Jury, his testimony before the Attorney General was not submitted to the Grand Jury and, to the extent that books and records delivered by him to the Attorney General under compulsion of a subpoena were later used as evidence before the Grand Jury, defendant never availed himself of his privilege to immunity as delineated in the provisions of section 2447 of the Penal Law and section 359 of the General Business Law.

Dated: October 21, 1963

J. S. C.

APPENDIX C

Opinion of Justice Sarafite, dated February 27, 1964.

SUPREME COURT,

NEW YORK COUNTY,

SPECIAL AND TRIAL TERM, PART XXX.

INDICTMENT No. 2531—63

THE PEOPLE OF THE STATE OF NEW YORK

against

SIDNEY SCHWARTZ,

Defendant.

SARAFITE, J.

This is a motion to suppress evidence obtained by the Attorney General.

Defendant has been indicted on five counts of obtaining the signatures of persons to written instruments with the intent to cheat or defraud, and three counts of related crimes.

All of the evidence (books, records, documents, etc.) were produced by defendant pursuant to subpoena served by the Attorney General. The defendant, represented by counsel, neither tested the validity of the subpoena by motion to quash nor, after responding to it, did he refuse to answer questions or produce evidence. Neither did he assert any privilege to withhold any answer given or evidence produced (See General Business Law, § 359, and Penal Law, § 2447).

It is difficult to comprehend how it could ever be argued that such evidence was obtained as a result of unlawful search and seizure.

Moreover, the issue raised here was passed upon in another form in a motion by the defendant to inspect the Grand Jury minutes and to dismiss the indictment "upon the ground that the evidence here presented was in violation of the defendant's constitutional rights in that defendant was compelled to testify and furnish evidence against himself" pursuant to subpoena, and that the indictment was allegedly based on insufficient legal evidence.

That motion was denied in all respects by the court, (Gellinoff, J., N.Y.L.J., October 24, 1963, p. 14, c. 5) holding that "defendant never availed himself of his privilege to immunity as delineated in the provisions of section 2447 of the Penal Law and section 359 of the General Business Law."

Defendant, on the same papers, now moves to suppress this same evidence.

The motion is denied.

Submit order.

Dated: February 27, 1964.

JOSEPH A. SARAFITE,
J. S. C.